PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

D5

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[redacted]

FILE: SRC 02 151 52106 Office: TEXAS SERVICE CENTER Date: OCT 23 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a country club/resort. It seeks to employ the beneficiary as a management trainee. The director found that the petitioner had not established that the training is unavailable in the beneficiary's home country. The director also stated that the training consists primarily of practical, on-the-job training and that the beneficiary would be involved in full-time productive labor beyond that which is incidental to the training. Finally, the director determined that the beneficiary already possesses substantial training and expertise in the proposed field.

Counsel filed a Notice of Appeal on February 11, 2003 stating that a brief would be filed within 30 days, but to date, no brief has been received. On the Notice of Appeal, counsel states that the petitioner had established that the proposed training is unavailable in the beneficiary's home country and that any productive employment is incidental to the training received.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part:

> (ii) Evidence required for petition involving alien trainee--(A) Conditions. The petitioner is required to demonstrate that:
>
> (1) The proposed training is not available in the alien's own country;
>
> (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) Description of training program. Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.

(iii) Restrictions on training program for alien trainee. A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

The first ground for the director's denial is that the petitioner had not established that the training is unavailable in the beneficiary's home country. In response to the director's request for evidence, the petitioner stated that the training is not available in Germany "since none of them [resorts] provide training in the American style of food and beverage management and do not live up to the quality standards of a private club located in the United States." The petitioner also submitted a letter from Ingo C. Peters, General Manager of Raffles Hotel Vier Jahreszeiten in Hamburg, Germany. Mr. Peters stated that he had hired people who had been the petitioner's trainees and that they are "well trained in providing the services to our American clientele." The purpose of training with the petitioner is specifically to learn the American style and standards of hotel and resort management, and therefore it is training that could only be received in the United States. The director's remarks on this issue are withdrawn.

The second basis for denial is that the training consists primarily of practical, on-the-job training and that the beneficiary would be involved in full-time productive labor beyond that which is incidental to the training. The director relied on *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965), stating that Citizenship and Immigration Services (CIS) had previously:

> [W]ithheld classification as a trainee (H-3) where the beneficiary was to be engaged primarily in on-the-job training. In that case, while the beneficiary was to supplement his training with some classroom instruction, the petition was denied upon a finding that the majority or primary part of the training proposed was to be on-the-job training. In the instant petition, because

the proposed training is comprised mostly of on-the-job training, the proposed training does not establish the beneficiary's eligibility.

The instant petition can be distinguished from *Sasano*. The beneficiary in that case was to be the sole employee whose entire training was to be on-the-job productive employment, supplemented by unscheduled trips to hear university lectures. In contrast, the beneficiary in this case would be involved in productive employment for approximately 50% of the time, with the other 50% devoted to classroom and formal educational training. While this is a significant percentage of time to be working in productive employment in the field of resort management, the skills cannot be entirely learned in the classroom setting. For these reasons, the director's comments relating to the *Sasano* decision shall be withdrawn.

The final ground for denial is that the beneficiary already possesses substantial training and expertise in the proposed field of training. The director quoted the petitioner's response to the request for evidence in her denial. The petitioner stated that the beneficiary had "completed hotel school in Germany and has several years of practical training/experience." The director appears to have based her denial on the beneficiary's education, and general experience in the hotel field, rather than on experience in the particular area of the proposed training—U.S. style hotel and resort management. The director's comments are withdrawn.

However, the petition may not be approved at this time. The director has not addressed the issue of the beneficiary's practical training and experience with this petitioner. The beneficiary has been working for the petitioner in J-1 status since October 2000. On her resume, the beneficiary lists the title of her position with the petitioner as "F&B Management Trainee." The petitioner submitted the minutes from three trainee meetings in 2002 and included among the attendees is someone with the beneficiary's first name (only first names are listed). It appears that the beneficiary has significant training and expertise in the proposed field of training due to her time working with the petitioner and, therefore, the program can not be approved pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(C).

Additionally, the director has not determined whether the structure and schedule of the training program meet the requirements of the regulations. The training program does not have a fixed schedule or means of evaluation, as is prohibited by

8 C.F.R. § 214.2(h)(7)(iii)(A). The timeframes scheduled for each topic area are listed as ranges rather dates certain.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of: (1) the beneficiary's practical training and experience with the petitioner in J-1 status since October 2000; and (2) the structure of the training program as outlined at 8 C.F.R. § 214.2(h)(7)(iii)(A). The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The matter is remanded to the director for further action and entry of a new decision in accordance with the above discussion, which if adverse to the petitioner is to be certified to the Administrative Appeals Office for review.